

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

ORIGINAL

76-1128

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**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellant,

-against-

MARIO GIGANTE, ET. AL.,

Defendants-Appellees.

*On Appeal From The United States District
Court For The Southern District of New York*

BRIEF FOR APPELLEE MARIO GIGANTE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

X

UNITED STATES OF AMERICA,

Appellant,

-v.-

MARIO GIGANTE, ET. AL.,

Defendant-Appellees

X

BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

Appellant appeals from an order of the Honorable Thomas Griesa, United States District Court Judge for the Southern District of New York granting appellees' suppression motion relating to electronic surveillance materials for failure to comply with Title 18, United States Code, Section 2518(8)(A).

ISSUE PRESENTED

Whether the sealing provisions of Title 18, United States Code, Section 2518 (8)(A) constitute such a significant and legitimate Congressional concern that suppression is required in this case - especially in view of the actions of the Government manifesting an awareness of the need for Judicial sealing.

STATEMENT OF THE CASE

Mario Gigante, defendant appellee, and other persons were accused in a two-count indictment of conspiratorial and substantive offenses relating to illegal gambling activities. The indictment was supported by electronic surveillance materials which were acquired pursuant to several wiretap orders covering a period from November, 1972, to April, 1973. At an evidentiary hearing, the Honorable Thomas P. Griesa ruled that Federal Law Enforcement agents had failed to observe sealing directives of Title 18, United States Code, Section 2518 (8) (A). Judge Griesa construed Section 2518 (8) (A) as possessing a separate and exclusive enforcement remedy which he invoked to suppress all electronic surveillance evidence. The United States of America appeals from this order.

Special Agent Richard Nally of the Federal Bureau of Investigation directed the investigation and electronic surveillance of the defendants. At the hearing, Agent Nally testified that he was aware of the strictures of the statutory scheme and had read Title III prior to submission of wiretap applications in this case. (TR. 39, 40). Agent Nally indicated his prior experience in investigations which utilized electronic surveillance. (TR. 84). Further elaboration by Agent Nally disclosed his responsibility and supervision of

the investigation. (TR. 16). The agent prepared memorandums for the use of agents regarding the legal requirements of the investigation vis-a-vis the use of electronic surveillance. (TR. 22). Furthermore, Nally, as Case Agent, personally informed agents as to the legal limits of interceptions and supervised the field operations of the agents. (TR. 22).

As to sealing procedure, Agent Nally instructed agents to remove, seal, initial and date the designated original tape recordings at the conclusion of monitoring. (TR. 28). The material would then be transferred to Agent Nally at the earliest possible time. Nally would place the original recordings in a locked file cabinet in an office area at the Federal Bureau of Investigation, for which he had the only key. (TR. 28, 29). Agents testified that this procedure was uniformly adhered to during the progress of the investigation.

The first wiretap application was granted by the Honorable Murray Gurfein on November 10, 1972. This order expired on November 24, 1972; but was extended on December 8 until December 23, 1972. At an unspecified date in December, Agent Nally and Strike Force Attorney James Dougherty presented the tapes derived from the November 10th order before Judge

Gurfein for sealing purposes.* At that time, Judge Gurfein inspected the outward condition of the tapes, observed the chain of custody notations, sealed the box of recordings in its entirety, and initialed the evidence tape. The Judge instructed Agent Nally to store the original recordings under the custody of the Federal Bureau of Investigation. (TR. 30, 31, 41, 95 to 97, 100 to 103).

However, no record of this proceeding was preserved and no sealing order was issued. (TR. 97). Due to this proceeding, it cannot be controverted that as early as December, 1972, Agent Nally was personally exposed to a vivid demonstration of the sealing procedures which are mandated by Title III. (TR. 75,83).

Subsequent wiretap applications were granted and expired within a period covering December, '72 to April, '73.

*The Government's brief estimates that the date of delivery to Judge Gurfein had to occur on or before December 14, 1972. (Footnote on Page 4 - Appellant's Brief). However, the record on this point is very unclear. One cannot conclude by the testimony whether the wiretap order granted by the Honorable Constance Baker Motley was in existence or had expired prior to Nally's appearance before Judge Gurfein. (TR. 98, lines 20 to 23). Judge Griesa held that the date of this proceeding was indefinitely fixed in December, 1972. (TR. 220).

These recordings were maintained under similar conditions as the recordings authorized by the first order of Judge Gurfein. However, Agent Nally did not apply for an order sealing these tapes until January, 1974. Sealing orders were signed by the issuing judges on either January 7, 1974 or January 8, 1974. The issuing judges directed that the recordings continue to be left at the offices of the Federal Bureau of Investigation.

At the evidentiary hearing, Judge Griesa ruled that the tape recordings had been properly preserved and that there was no indication of tampering. (TR. 216-17). However, Judge Griesa found that the sealing process adopted by federal agents did not fulfill the "immediacy" directives of Title 18, Section 2518 (8) (A). (TR. 217). Additionally, the Court ruled that the December, 1972, sealing by Judge Gurfein failed to comply with the statute. (TR. 219-220). Consequently, Judge Griesa suppressed all evidence obtained under all wiretap orders due to violations of Section 2518 (8) (A). (TR. 220).

ARGUMENT

SUPPRESSION OF WIRETAP EVIDENCE WAS
JUSTIFIED DUE TO FEDERAL AGENT'S NON-
COMPLIANCE WITH STATUTORY DIRECTIVES.

The enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code, Sections 2510-2520 prescribed the circumstances under which wiretapping and electronic eavesdropping may be conducted consistent with the Fourth Amendment. This statutory scheme was the Congressional response to the legal abuses chronicled in Berger v. New York, 388 U.S. 41 (1967). The basic impetus of the Berger critique was the deficiency in judicial supervision over the practice of electronic surveillance by law enforcement officials. The Supreme Court condemned the discretionary procedural and investigative techniques which permeated wiretapping intrusions.

"Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." Berger v. New York, *supra*,

Title III was created to provide a measure of judicial supervision and enact a system of protective devices to limit such invasions of privacy.

The Government contends that Judge Griesa's suppression was improper, in that the Government had substantially fulfilled the purposes of Section 2518 (8) (A). Judge Griesa found that the Federal Agents had preserved the integrity and confidentiality of the tapes and that the defendants have not demonstrated any prejudice from the lack of sealing. However, the sealing requirements do not serve the solitary purpose of safeguarding the tapes from alteration or destruction. As stated by Justice White in United States v. Giordano, 416, U.S. 505, 515 (1974), the legislative purposes behind Title III are difficult to discern. Yet the distinct sections of the Act are an integrated document and must be read as such. The concepts of judicial supervision and the instillation of public confidence in the law enforcement process are enunciated purposes which characterized the law-making sessions of Title III.

The Senate Reports indicate Title III's generalized purposes to be: (1.) Protecting the privacy of wire and oral communications and (2.) Delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. 1968 U.S. Code Cong. and Adm. News 2112, 2153.

Subparagraph 2518 (8) (A) furthers these purposes in several ways. It contributes substantially to one of the Act's

implicit underlying policies -- the imposition of judicial scrutiny and control over all aspects of an authorized wiretap. This policy was expressly stated by Congress as follows:

"The interception of wire or oral communications...should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court."

1968 U.S. Code Cong. and Adm. News at 2177; Cf Berger v. New York, supra, at 54 and 60; Katz v. United States, 389 U.S. 347, 356 (1967).

Thus, it is incorrect for the Government to suggest that the preservation of the tapes from tampering is the primary objective of Section 2518 (8)(A). Case law interpreting other conditions of Title III authorization suggest several equally significant and imperative considerations. The concept of judicial supervision is in accord with our rule of law and reinforces public confidence in the regular and lawful utilization and administration of electronic surveillance devices. United States v. Giordano, 416 U.S. 505 (1974); United States v. Brodson, 528 F.2d 214 (7th Cir. 1975); United States v. Bernstein, 509 F.2d 966 (4th Cir. 1975), pet. for cert. filed. 43 U.S.L.W. 3637 (U.S. May 27, 1975);

United States v. Belosi, 501 F.2d 833 (District of Columbia Cir. 1974); United States v. Capra, 501 F.2d 267, 276 (2nd Cir. 1974).

In United States v. Giordano, *supra*, the Supreme Court held that suppression was required where a wiretap application was not authorized by the official expressly designated by the statute. However, United States v. Chavez, 416, U.S. 562 (1974), held that misidentification of the official who approved the wiretap application did not constitute a fatal defect. These cases indicate that procedural error does not mandate exclusion in every circumstance.

Suppression is necessary when:

"failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. United States v. Giordano, *supra*, at 527.

In Giordano, the authorization provisions were held to be a functional safeguard. A showing of prejudice was not needed to invoke the exclusionary remedy. The authorization procedure was critical in that it structured the centralization and accountability premises of the statute.

The Court believed that public interest was best served by fixing responsibility for the use of electronic surveillance techniques. Approval and centralization aspects of Title III were not of constitutional dimension. The condition precedent of approval by a designated legal officer did not affect the investigative validity or evidentiary utility of the surveillance. However, the practice was deemed to be central as it facilitates the Congressional intent to impose accountability features into the employment of this extraordinary investigative device.

In contrast, the Supreme Court in United States v. Chavez, supra, ruled that misidentification of the officer authorizing the wiretap application did not affect the fulfillment of any of the reviewing or approval functions required by Congress. There was substantial compliance with the statutory purpose as the official, responsible for enforcement, did perform his supervisory capacity.

The Government concedes that there was a technical violation of Section 2518 (8)(A). However, this position fails to perceive the significance of the sealing omission. Although the sealing provisions are conditions subsequent to the investigative intrusion, the requirements form an integral feature of the regulatory and enforcement system conceived by Congress. Sealing is not a ministerial act. It safeguards

against the possibility of tampering; but additionally provides a rare opportunity for judicial supervision, review, and critique over a critical investigative stage.

The sealing procedure contemplates two areas of compliance:

1. Immediate availability of the tapes after the expiration of the order to the issuing judge; and
2. Presence of a seal or satisfactory explanation for the absence thereof.

Judge Griesa ruled that the statute implicitly required these conditions to be jointly achieved within a reasonable time sequence after expiration of the order. This ruling was only a fair construction of the statute as it recognized the principle of judicial supervision* was a dominating legislative concern.

Judge Griesa expressly relied upon the dissenting opinion in *United States v. Falcone*, 505 F.2d 478, 485 (3d Cir.

*The contours of judicial sealing have not been defined by the statute or case law. It could be reasonably argued that only some form of inspection and ratification of law enforcement procedures is necessary. However, some manner of judicial participation immediately after expiration of the order is clearly required.

1974), cert. denied, 420 U.S. 955 (1975). Judge Griesa argued that the immediacy requirement imposed a primary obligation under the statute. He ruled that Subparagraph 2518 (8) (A) clearly envisioned protective action by the judge irrespective of any showing of improper custody by law enforcement agents. (TR. 219).

In advancing for support, United States v. Falcone, supra, and United States v. Lawson, 521 F.2d 1404 (7th Cir. August 20, 1975), the Government assumes that the legislative purpose for the sealing procedure is to protect the integrity of the tapes. That is indeed an objective of Section 2518 (8) (A). However, if the Congress had deemed integrity of the tapes to be the criteria of admissibility, it could have conditioned admission on the tapes' integrity without reference to judicial supervision.

The New York Court of Appeals in People v. Nicolletti, 34 NY 2d 249 (1974) held that the sealing requirements regarding electronic surveillance must be strictly observed. The court rejected the argument that the rationale of sealing is solely to protect against tampering. The court emphasized the other aspects of the requirements and pointed out the role of sealing in establishing chain of custody - a supervisory feature. (Cf. People v. Sher, 38 NY 2d 660 (1976). Strict adherence to statutory sealing directives despite absence of tampering. See

also United States v. Bellosi, *supra*, which states the proposition that the clearly worded language of Title III must be given its full effect.)

In a recent Second Circuit opinion, Chief Judge Kaufman reaffirmed a strict interpretation of statutory language relating to the judicial regulation of eavesdropping intrusions. The opinion stated that:

"Strict compliance with the requirements of Section 2517 (5) and other strictures imposed by Title III is no less essential... Congress carefully circumscribed utilization of the occasionally useful but potentially dangerous law enforcement tools of electronic surveillance in an effort to comply with the Fourth Amendment and to "protect effectively the privacy of wire and oral communications (and) the integrity of court and administrative proceedings" Pub. L90-351, Title III, 201. To ignore or gloss over these restrictions, or view them as mere technicalities to be read in such a fashion as to render them nugatory, then is to place in peril our cherished personal liberties. United States v. Marion, - F.2d -, page 3584, Slip Op. 794, Docket No. 75-1408 (2d Cir. May 7, 1976).

~~This opinion involved the construction of 18 U.S.C. §2517 (5) a statutory stricture requiring subsequent judicial approval for the incidental interception of offenses other than those specified in the initial authorization. The Government argued that judicial approval was necessary only where the intercepted communication was totally unrelated to~~

see attached

This opinion involved the construction of 18 U.S.C. §2517 (5) a statutory stricture requiring subsequent judicial approval for the incidental interception of offenses other than those specified in the initial authorization. The Government argued that judicial approval was necessary only where the intercepted communication was totally unrelated to the previously specified offense. The panel rejected this qualification of a Congressional mandate and declined to redraft the statute to excuse the fact that the Government had violated a key provision of the legislative scheme of Title III -- one which related to the supervisory function of the courts over the use and employment of electronic surveillance.

the supervisory function of the courts over the use and employment of electronic surveillance.

The Government argues that Fourth Amendment standards of reasonableness, deterrence of improper conduct and showing of prejudice on defendant's behalf are operative factors. However, it should be noted that United States v. Giordano, *supra*, stated the inquiry into the objectives of Title III does not resolve upon an examination of the Fourth Amendment; but whether Congressional concern was so significant that deviation from the statutory norm requires suppression. In the case before the Court, the Government presents proof of rectified conditions. Yet, it should be appreciated that the Giordano opinion rejected a defense of subsequent ratification by the designated official. One could thus infer if this Court finds sealing to be within the sphere of strict legislative concern, subsequent repair is not a defense to a suppression motion.

The record discloses that Case Agent Nally had knowledge of the sealing requirements after his appearance in Judge Gurfein's chambers. In addition, agents were applying for new orders during this period. The federal agents observed the statutory amenities regarding application and minimization, but arbitrarily and capriciously refused to abide by the sealing requirements. The circumstances before this Court do not reflect good faith observance or justifiable

ignorance of requirements. United States v Poeta, 455 F.2d 117 (2nd Cir. 1972), cert. denied, 406 U.S. 948 (1972); but a complete and unexcused disregard of established policy directives. With the exception of the December appearance before Judge Gurfein, federal authorities failed to observe judicial sealing for periods ranging from several months to greater than a year. Indeed the Government offered no reasonable explanation for the delay.

The Government further argues that the December proceeding before Judge Gurfein complied with sealing requirements. Judge Griesa suppressed tapes relating to this order on the grounds that there were neither transcription of the proceeding nor the issuance of a written order of sealing.

Appellant points out that the statute does not prescribe a particular form of sealing. However, this overlooks Title 18, United States Code, Section 2518 (8) (B) which establishes confidentiality and recordation standards. This subparagraph requires preservation of applications and orders relating to electronic surveillance for ten years and attaches to the sealing process. The December proceeding before Judge Gurfein violates this subdivision. Clearly, the substantive protections of sealing should not depend upon the personal recollection of parties participating in the sealing. The

inability of Agent Nally to recall the date and nature of the proceedings portends the potentiality for abuse and uncertainty in the event of non-recorded proceedings.

The Government's position would reduce sealing to a ministerial act. If integrity of the tapes is sole determinative of admissibility, this substitutes the good will of investigative agents for the structure of judicial review enacted by Congress. The Government is asking this Court to refashion a clearly-worded provision in Title III in a way that would transform a stringent condition of enforcement into a discretionary act.

The legislative history of Section 2518(8)(A) is unclear. However, Title III's legal evolution was founded upon a policy of imposing judicial review and control over all aspects of an authorized wiretap. The appearance of safekeeping is a necessary and legitimate function. Sealing serves a dual purpose. Prompt judicial scrutiny rebuts any suggestion of tampering by the Government. It compels law enforcement agents to adhere to statutory procedures. Furthermore, sealing, promotes the public appreciation and confidence in its law enforcement apparatus.

The condition subsequent of sealing is a central and functional safeguard of the statutory scheme. The sealing provisions constitute a key element in the system of checks

and balances envisioned by Congress. Sealing directly and substantially implements the Congressional intent to control the potential abuses of electronic surveillance. Violation of the sealing requirement thus requires suppression of those tapes which failed to observe statutory directives.

CONCLUSION

For all of the reasons outlined above, and on the basis of the record below, the order of the District Court should be affirmed.

Respectfully submitted,

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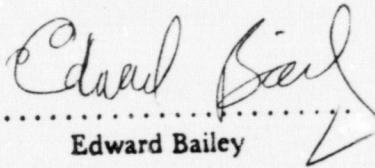
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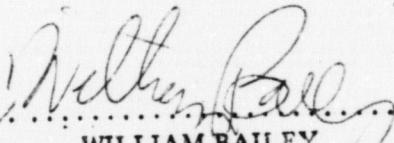
STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of May 1976 at No. 1 St. Andrews Pl. NYC deponent served the within Brief

upon U.S. Atty., So. District of N.Y. herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Respondent therein.

Sworn to before me,
this 24 day of May 1976


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978 1977